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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 TERRY LYDELL KIRKPATRICK, SR.,) Civil No. 09cv2020-JM (BLM)
12)
13 Plaintiff,) **REPORT AND RECOMMENDATION FOR**
14 v.) **ORDER GRANTING DEFENDANT'S**
15 GUILLERMO GIRON,) **MOTION TO DISMISS**
16) **[Doc. No. 6]**
17 Defendant.)
18 _____)

19 This Report and Recommendation is submitted to United States
20 District Judge Jeffrey T. Miller pursuant to 28 U.S.C. § 636(b) and
21 Local Civil Rules 72.1(c) and 72.3(f) of the United States District
22 Court for the Southern District of California.

23 On September 15, 2009, Plaintiff Terry Lydell Kirkpatrick
24 Sr., a state prisoner proceeding *pro se* and *in forma pauperis*, filed
25 this civil rights suit against Correctional Officer Guillermo Giron
26 under 42 U.S.C. § 1983. Doc. No. 1. Officer Giron ("Defendant")
27 filed a motion to dismiss the Complaint on December 14, 2009 for
28 failure to exhaust administrative remedies. Doc. No. 6. Plaintiff
opposed the motion on December 21, 2009 [Doc. No. 10] and Defendant
filed a reply on February 1, 2010 [Doc. No. 12].

This Court finds the issue appropriate for decision on the papers and without oral argument pursuant to Local Civil Rule 7.1.(d)(1) (see Doc. No. 7) and therefore **DENIES** Plaintiff's motion to participate in the hearing via telephone (Doc. No. 10 at 2). The Court has considered the Complaint, Defendant's Motion to Dismiss, Plaintiff's Opposition, Defendant's Reply and all supporting documents submitted by the parties. For the reasons set forth below, this Court **RECOMMENDS** that Defendant's Motion to Dismiss ("MTD") be **GRANTED**.

BACKGROUND

Plaintiff's claims arise from actions allegedly committed by Correctional Officer Guillermo Giron while Plaintiff was an inmate at R.J. Donovan State Prison. Doc. No. 1 at 1. According to the complaint, Plaintiff and Defendant were having a verbal disagreement on May 24, 2009, which resulted in Plaintiff being handcuffed and escorted out of the building by Defendant. Id. at 3. Plaintiff alleges that while leaving the building, Defendant "slammed" him into the concrete and attempted to "plant" his face in the door frame, and that he only was able to avoid serious injury by turning his face. Id. Plaintiff claims that once they were outside, Defendant immediately began choking him and trying to shove his face into the ground. Id. Plaintiff further claims that he had to roll away in order to protect himself, and in doing so, forced Defendant to roll off of him. Id. Defendant then tried to knee Plaintiff in the chest while Plaintiff was lying on his back. Id. Plaintiff, who has had past medical problems, including open heart surgery and a spinal disk replacement, curled up to protect himself. Id. Plaintiff alleges that Defendant's conduct violated his

1 constitutional rights of free speech and freedom from cruel and
2 unusual punishment as guaranteed by the First and Eighth Amendments
3 of the United States Constitution. Id.

4 Plaintiff seeks \$20,000 in damages, \$30,000 in punitive
5 damages, and injunctive relief preventing Defendant from "working
6 here on the level one yard where he is not supervised properly."
7 Id. at 5. Plaintiff also asks that: (1) Defendant be required to
8 participate in an anger management class; (2) this incident be noted
9 in Defendant's personnel file; (3) Defendant "be taken off of the
10 min yard"; and, (4) Defendant be ordered not to retaliate against
11 Plaintiff. Id.

12 DISCUSSION

13 Defendant contends that Plaintiff failed to exhaust his
14 administrative remedies prior to filing a complaint in this Court
15 and that Plaintiff's complaint must therefore be dismissed. Doc. 6-
16 1 at 1. Defendant acknowledges that Plaintiff filed a first level
17 administrative appeal on May 29, 2009 but asserts that Plaintiff
18 subsequently withdrew the appeal. Doc. No. 6-1 at 5. Defendant
19 explains that when Plaintiff attempted to resubmit the appeal in
20 September 2009, it was rejected and he was told that if he wanted to
21 allege the withdrawal was committed under duress, he should "re-file
22 the appeal to the next level specifically explaining the duress."
23 Id. Defendant argues that since Plaintiff did not resubmit his
24 appeal or file anything at the second or third levels, Plaintiff's
25 claim is not exhausted and this complaint must be dismissed. Id.

26 Plaintiff responds that he attempted to exhaust his
27 administrative remedies, but admits that he was unsuccessful. Doc.
28

1 No. 10 at 2. Plaintiff explains that he withdrew his 602¹ because
 2 Lt. Moreno promised he would grant Plaintiff everything he
 3 requested. Id. Plaintiff said he was "highly medicated" when he
 4 withdrew his 602 and that Lt. Moreno subsequently failed to satisfy
 5 his promises. Id. Plaintiff said he then attempted to resubmit his
 6 602 but Lt. Alinby said he would discuss Plaintiff's complaint with
 7 the Warden. Id. Plaintiff asserted that he failed to take further
 8 action because Lt. Alinby never responded to him. Id. As a result,
 9 Plaintiff argues that he "attempted to exhaust the use of my
 10 administrative remedies to no avail." Id.

11 The Prison Litigation Reform Act ("PLRA") of 1995 provides
 12 that:

13 No action shall be brought with respect to prison
 14 conditions under section 1983 of this title, or any
 15 other Federal law, by a prisoner confined in any jail,
 16 prison, or other correctional facility until such
 administrative remedies as are available are
 exhausted.

17 42 U.S.C. § 1997e(a). "Congress enacted § 1997e(a) to reduce the
 18 quantity and improve the quality of prisoner suits." Porter v.
 19 Nussle, 534 U.S. 516, 524 (2002). The United States Supreme Court
 20 has confirmed that exhaustion is a mandatory prerequisite to filing
 21 suit in federal court. Id. However, the prisoner is not required
 22 to specially plead or demonstrate exhaustion in his or her complaint
 23 because failure to exhaust is an affirmative defense under the PLRA.
 24 Jones v. Bock, 549 U.S. 199, 216 (2007).

25 The proper vehicle for challenging a complaint based on
 26

27 ¹ An "Inmate/Parolee CDC 602" is the form California prisoners must
 28 complete to initiate a claim challenging conditions of confinement or prison
 disciplinary action taken against them. The filing of the CDC Form 602 initiates
 the prison administrative grievance process. See 15 Cal. Code Regs. §3084.2(a)
 ("The appellant shall use a CDC Form 602, Inmate/Parolee Appeal Form, to describe
 the problem and action requested.").

1 failure to exhaust administrative remedies is an unenumerated motion
 2 under Rule 12(b) of the Federal Rules of Civil Procedure. Wyatt v.
 3 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Unlike under Rule
 4 12(b)(6), "[i]n deciding a motion to dismiss for a failure to
 5 exhaust nonjudicial remedies, the court may look beyond the
 6 pleadings and decide disputed issues of fact." Id. at 1119-20. The
 7 plaintiff, however, must be provided with an opportunity to develop
 8 a record to refute the defendant's prima facie showing of
 9 non-exhaustion. Id. at 1120 n.14. If the district court concludes
 10 that the prisoner has failed to exhaust his or her administrative
 11 remedies, and cannot do so, the claim may be dismissed with
 12 prejudice². See Rowe v. Montoya, 2010 WL 703033, *5 (E.D.Cal.
 13 Feb. 25, 2010).

14 Failure to exhaust may not be waived. See Woodford, 548 U.S.
 15 at 85 ("[e]xhaustion is no longer left to the discretion of the
 16 district court"). The United States Supreme Court has stated that
 17 "[t]here is no question that exhaustion is mandatory under the PLRA
 18 and that unexhausted claims cannot be brought in court." Jones, 549
 19 U.S. at 211. A prisoner also cannot satisfy the PLRA's exhaustion
 20

21
 22 ²Prior to the Supreme Court's decision in Woodford v. Ngo, 548 U.S. 81,
 23 (2006), Ninth Circuit law directed the district court to dismiss a complaint
 24 without prejudice to allow the prisoner a chance to exhaust his administrative
 25 remedies. Wyatt, 315 F.3d at 1120 ("If the district court concludes that the
 26 prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal
 27 of the claim without prejudice."); see also McKinney v. Carey, 311 F.3d at 1198,
 28 1199-1200 (9th Cir.2002). However, Woodford forecloses any untimely exhaustion.
 The exhaustion requirement may not be satisfied "by filing an untimely or
 otherwise procedurally defective administrative grievance or appeal." Woodford,
 548 U.S. at 82. Proper exhaustion requires compliance with an agency's deadlines
 and other critical procedural rules. Id. at 90; see e.g., Janoe v. Garcia, 2007
 WL 1110914, at *8-9 (S.D.Cal. March 29, 2007) (dismissing complaint with
 prejudice where a prisoner did not pursue the three-step formal review process,
 and the time to do so had expired); Regan v. Frank, 2007 WL 106537, at *4-5
 (D.Haw. Jan.9, 2007) (dismissing plaintiff's claims with prejudice for failure
 to timely exhaust administrative remedies).

1 requirement by "filing an untimely or otherwise procedurally
2 defective administrative grievance or appeal." Woodford, 548 U.S.
3 at 83-84. Nor can a prisoner who did not make any attempt to
4 utilize the prison grievance system sidestep the exhaustion
5 requirement by arguing that it now would be futile to attempt to
6 exhaust within the prison system. Booth v. Churner, 532 U.S. 731,
7 741 n.6 (2001) ("we stress the point . . . that we will not read
8 futility or other exceptions into statutory exhaustion requirements
9 where Congress has provided otherwise"); see also Woodford, 548 U.S.
10 at 100 ("if the party never pursues all available avenues of
11 administrative review, the person will never be able to sue in
12 federal court").

13 As Defendant correctly explains, the California Department of
14 Corrections and Rehabilitation ("CDCR") utilizes a four-step
15 grievance process for prisoners seeking review of an administrative
16 decision or perceived mistreatment. Vaden v. Summerhill, 449 F.3d
17 1047, 1048-49 (9th Cir. 2006); Cal. Code Regs. tit. 15,
18 §§ 3084.1-3084.6. An inmate wishing to exhaust his or her remedies
19 must complete four steps: (1) fill out a complaint form (generally
20 referred to as a "602" form), present it to the prison official
21 involved, and attempt informal resolution; (2) if not resolved, file
22 for and receive a first formal level decision; (3) if relief is not
23 granted at the first formal level, file for and receive a second
24 formal level decision; and, (4) if relief is not granted at the
25 second level, file for and receive a third level decision from the
26 Director of Corrections. 15 C.C.R. § 3084.5. An inmate must submit
27 his appeal "within 15 working days of the event or decision being
28 appealed, or of receiving an unacceptable lower level appeal

1 decision." 15 C.C.R. § 3084.6(c). "Only after the administrative
2 process ends and leaves his grievances unredressed" may the inmate
3 initiate litigation in federal court. Vaden, 449 F.3d at 1051. A
4 review of the submitted records and documents establishes that
5 Plaintiff did not exhaust his administrative remedies.

6 The original incident occurred on May 24, 2009 and Plaintiff
7 filed an administrative appeal (log number RJD-1-09-00706) on May
8 29, 2009. See Docs. No. 1 at 4 and 6-2 at Exhibit A. In his
9 appeal, Plaintiff requested that he receive proper medical
10 attention, that he be compensated for the physical and mental pain
11 caused by Defendant, and that Defendant be investigated for the
12 unnecessary and excessive use of force. See Doc. No. 6-2 at Exhibit
13 A. On June 10, 2009, Plaintiff withdrew his appeal, stating:

14 I withdraw this CDC 602-09-706. I do not request any
15 witnesses and I am satisfied with the response by Lt.
16 Moreno, A., and, Sgt. Omohondro, W., I talked to them
17 and request and want to withdraw this 602 and any
18 related issues. I do not want to pursue this matter
19 any further.

20 Id.

21 When Plaintiff chose to withdraw his appeal in June 2009, he
22 stopped short of exhausting his administrative remedies. See Cruz
23 v. Tilton, 2009 WL 3126518, *5 (E.D.Cal. Sept. 24, 2009) (citations
24 omitted) (stating that a "withdrawn inmate grievance cannot be used
25 to demonstrate exhaustion of administrative remedies"). While
26 Plaintiff claims that he only withdrew his complaint because he was
27 promised by Lieutenant A. Moreno and Sargent W. Omohondro that all
28 of his requests would be granted if he did so, Plaintiff has not
29 offered any evidence to support that claim. See Cruz, 2009 WL
30 3126518 at *5.

31 On August 25, 2009, Plaintiff attempted to resubmit the May

1 29, 2009 appeal. See Doc. No. 6-2 at Exhibit B. Plaintiff stated
2 that the June withdrawal occurred while he was heavily medicated and
3 under duress. Id. Plaintiff also claimed that while Lt. Moreno
4 promised that all of Plaintiff's requests would be granted if he
5 withdrew his complaint, the requests were not all granted. Doc. No.
6 1 at 4. Plaintiff again sought compensation for his physical and
7 mental suffering and asked that Defendant be investigated and
8 required to attend anger management and sensitivity classes. Doc.
9 No. 6-2 at Exhibit B.

10 Plaintiff received a letter from the Inmate/Parolee Appeals
11 Coordinator dated September 1, 2009, stating that his request to
12 resubmit the appeal was untimely, and that in order to pursue the
13 matter further, he needed to submit a written explanation and
14 supporting documentation explaining the untimeliness. See Doc. No.
15 6-2 at Exhibit C. In response, on September 3, 2009, Plaintiff
16 again attempted to resubmit his May 24, 2009 appeal, stating that
17 the appeal was filed in a timely manner and was previously withdrawn
18 under duress. See Docs. No. 10 at 1. and 6-2 at Exhibit D.

19 On September 17, 2009, the Inmate/Parolee Appeals Coordinator
20 informed Plaintiff that the September 3, 2009 submission was
21 rejected because it duplicated the appeal he withdrew on June 10,
22 2009. Doc. No. 6-2 at Exhibit E. The letter stated "If you wanted
23 to claim duress, you should have re-filed that appeal to the next
24 level with an explanation as to what the duress was." Id.
25 Plaintiff took no further action in this matter under the CDCR
26 grievance process (Docs. No. 6-2 and 6-3) and on September 15, 2009,
27 he filed a complaint in this court.

28 As previously stated, an inmate must submit his appeal

1 "within 15 working days of the event or decision being appealed, or
2 of receiving an unacceptable lower level appeal decision." 15
3 C.C.R. § 3084.6(c). Here, Plaintiff waited until August 25, 2009 to
4 resubmit his appeal. This submission occurred approximately three
5 months after the original appeal was submitted, and more than two
6 months after Plaintiff withdrew the appeal. As such, his
7 resubmission occurred well after the fifteen-day time frame expired
8 and therefore was untimely. In addition, Plaintiff did not pursue
9 his apparent opportunity to cure the untimeliness by explaining the
10 alleged duress. On two occasions, the Inmate/Parolee Appeals
11 Coordinator advised Plaintiff that his appeal was untimely and in
12 the first letter explained that if he wanted to allege duress, he
13 needed to file a new appeal explaining in writing the alleged duress
14 and how the alleged duress caused the untimely submission. Doc. No.
15 6-2 at Exhibits C and E. Plaintiff did not provide the requested
16 written explanation, nor the supporting documentation. Plaintiff
17 also failed to take his complaint to the final level of review.
18 Docs. No. 6-2 and 6-3. Because Plaintiff failed to submit his
19 appeal in a timely manner, he did not satisfy the PRLA's exhaustion
20 requirement. See Woodford, 548 U.S. at 83-83 (finding that a
21 prisoner cannot satisfy the PRLA's exhaustion requirement by "filing
22 an untimely or otherwise procedurally defective administrative
23 grievance or appeal"); see also Cruz v. Cate, 2010 WL 711197, *1
24 (9th Cir. 2010) (finding that the district court properly dismissed
25 the action where plaintiff failed to submit an inmate grievance
26 within the 15-working-day deadline); and Stewart v. Calderon, 2009
27 WL 3416127, *1 (9th Cir. 2009) (same).

28 It appears that Plaintiff believes he can bypass the

1 timeliness issue by designating the May 29, 2009 appeal a "Citizen's
2 Complaint" as he repeatedly makes or emphasizes that designation.
3 For example, when Plaintiff resubmitted his appeal in September
4 2009, he noted that the 602 he filed was a "citizen's complaint."
5 Doc. No. 6-2, Exhibit D. He also wrote across the top of the new
6 appeal that "it was a citizen's complaint;" this phrase was not
7 present when it was first filed. Id; see also Doc. No. 6-2, Exhibit
8 A. Finally, in his complaint before this Court, Plaintiff states
9 that he submitted and withdrew a "citizen's complaint." Doc. No. 1
10 at 4.

11 Plaintiff's assertion that his appeal is a citizen's
12 complaint and, therefore, entitled to more than fifteen days for
13 submission is misplaced. Citizen's complaints are discussed in 15
14 C.C.R. § 3391(b). While 15 C.C.R. § 3391(b)³ does allow twelve
15 months for an allegation of misconduct to be made, the section is
16 expressly limited to non-inmates and, therefore, does not apply to
17 Plaintiff or his appeal. Plaintiff was incarcerated at the time of
18 the incident and, therefore, was required to submit his grievance
19 within fifteen days. 15 C.C.R. § 3084.5 and 3084.6(c)

20 In sum, Plaintiff failed to exhaust his administrative
21 remedies. He voluntarily withdrew the one appeal that he filed
22 regarding the incident with Officer Giron and placed no conditions
23 or promises on that withdrawal. Doc. No. 6-2 at Exhibit A. He then
24 waited more than fifteen days to resubmit the appeal and he failed

25
26 ³15 C.C.R. § 3391(b) states "an allegation by a non-inmate of misconduct
27 by a departmental peace officer as defined in section 3291(b), is a citizen's
28 complaint pursuant to Penal Code section 832.5. Citizen's complaints alleging
misconduct of a departmental peace officer shall be filed within twelve months
of the alleged misconduct."

1 to provide any explanation or documentation explaining the
2 untimeliness. Docs. No. 6-2 and 6-3. Finally, while Plaintiff
3 alleged that he withdrew his complaint under duress, he never re-
4 filed his appeal with an explanation and documentation of the
5 duress. Doc. No. 6-2 at Exhibit E.

6 **CONCLUSION**

7 For all the foregoing reasons, **IT IS HEREBY RECOMMENDED** that
8 the District Court issue an Order: (1) approving and adopting this
9 Report and Recommendation and (2) granting Defendants' Motion to
10 Dismiss.

11 **IT IS HEREBY ORDERED** that any written objections to this
12 Report must be filed with the Court and served on all parties **no**
13 **later than May 26, 2010**. The document should be captioned
14 "Objections to Report and Recommendation."

15 **IT IS FURTHER ORDERED** that any reply to the objections shall
16 be filed with the Court and served on all parties **no later than June**
17 **16, 2010**. The parties are advised that failure to file objections
18 within the specified time may waive the right to raise those
19 objections on appeal of the Court's order. See Turner v. Duncan,
20 158 F.3d 449, 455 (9th Cir. 1998).

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22
23 DATED: May 5, 2010

24 

25 BARBARA L. MAJOR
26 United States Magistrate Judge
27
28